Thurston Motor Lines, Inc. *and* Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 11-CA-9267-1

September 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On February 5, 1982, Administrative Law Judge Helen F. Hoyt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt her recommended Order, except as modified herein.[3]

While we agree with the Administrative Law Judge that Respondent's discharge of Ronald Davis violated Section 8(a)(3) of the Act, we do not agree with her rationale. The Administrative Law Judge found that there was an accident and that Davis failed to report it. She then concluded that the discharge was an unreasonably harsh punishment for such failure considering that this employee performed at an acceptable level for a period of time which qualified him for three safety awards, and that others had not been discharged for the same offense. Contrary to the Administrative Law Judge, we find that no accident occurred and there was nothing to report.

The incident was investigated by Respondent's safety supervisor, Paul Jump, who reported to Terminal Manager Killelea that a brick had been chipped on the customer's loading dock but that no damage had occurred, and that there was no cost for damages. Davis and the customer's employee both laughed about the incident at the time it occurred. In addition, Respondent never sought Davis' version of the "accident" or the reasons why he did not report it. In our opinion, Respondent has seized upon a trifling incident, called it an "accident," and used it as a pretext to discharge Davis for his union activity.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Thurston Motor Lines, Inc., Goldsboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Ronald Davis immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings suffered as a result of his unlawful discharge. Backpay and interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)."

3. Insert the following as new paragraph 2(b) and reletter consecutively the remaining paragraphs:

"(b) Expunge from Ronald Davis' personnel records, or other files, any reference to his discharge, and notify him in writing that this has been

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[3] We find that it will effectuate the purposes of the Act to require Respondent to expunge from Ronald Davis' personnel records or other files any reference to his unlawful discharge. We shall modify the Administrative Law Judge's recommended Order accordingly. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

In *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), the Board stated that it would continue to find that a broad order may be warranted in discriminatory discharge cases where, either previous to or concurrently with the discriminatory discharge, it is shown that a respondent has engaged in other severe violations of the Act. Thus, repeat offenders and egregious violators of the Act would still be subject to the traditional Board remedy for conduct which requires broad injunctive relief. In September 1981, the Board adopted an Administrative Law Judge's Decision which found that this Respondent engaged in violations of Sec. 8(a)(1), (3), and (5) of the Act. See *Thurston Motor Lines, Inc.*, 257 NLRB 1262 (1981). Thus, in light of Respondent's demonstrated proclivity to violate the Act, we find that the broad injunctive order is appropriate herein and have modified the Administrative Law Judge's recommended Order accordingly.

We have modified par. 2(a) of the Administrative Law Judge's recommended Order to reflect the Board's usual reinstatement and make-whole language.

done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees in regard to their hire or tenure of employment or any term or condition of employment because they engage in union or protected concerted activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

WE WILL offer Ronald Davis immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered as a result of his discharge, with interest.

WE WILL expunge from Ronald Davis' personnel records, or other files, any reference to his discharge, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

THURSTON MOTOR LINES, INC.

DECISION

STATEMENT OF THE CASE

HELEN F. HOYT, Administrative Law Judge: The charge in this case was filed on July 11, 1980, by Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union. On August 28, 1980, the complaint issued alleging that Thurston Motor Lines, Inc., herein called Respondent, violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, herein called the Act, by suspending and then discharging its employee Ronald Davis because he joined or assisted the Union or engaged in other union activity or concerted activity for the purpose of collective bargaining and other mutual aid and protection. In its answer, Respondent denies the commission of any unfair labor practices.

A hearing was held before me in Goldsboro, North Carolina, on March 30–31, 1981. Respondent's brief and the General Counsel's oral argument at the conclusion of the hearing have been received and considered herein.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

Thurston Motor Lines, Inc., is a North Carolina corporation conducting common carrier freight operations by motor vehicles under certificates issued by the Interstate Commerce Commission. Thurston has operated in part from a facility in Goldsboro, North Carolina. Respondent has received gross revenues in excess of $50,000 for services performed directly outside the State of North Carolina, and transported materials from the State of North Carolina to points outside the State of North Carolina.

The Goldsboro terminal of Thurston is supervised by a terminal manager who conducts the carrier's operations and supervises employees including any disciplinary action necessary. On July 1, 1980, a driver for Respondent, Ronnie Davis (age 31), was suspended for 2 days by Terminal Manager Greg Killelea after the latter received a report from a customer that the driver had caused minor damage to a brick building at the time of a delivery to the customer, S. B. Parker, in New Bern, North Carolina, at or about 11:30 a.m. Davis completed the Company's vehicle accident report stating that the accident had occurred when he backed the trailer up to the loading door so as to miss a car parked close to the door on the driver's left. By this maneuver the right side of the vehicle overlapped the door and chipped a brick when it touched the building. Davis admitted to Killelea that the accident had occurred after Davis returned to the terminal but defended his failure to call into the terminal prior to returning to the terminal because he considered the entire incident to be a minor one and not an accident worthy of a report to Thurston. Although Davis considered the incident at the time in a joking manner, the official at the Parker Company was upset and noted on the freight bill that the driver delivering the goods had hit the building. Davis, however, noted on the same bill "No Damage." Parker's employee laughed, as did Davis, and the latter left the premises to complete his deliveries before returning later the same evening to the Thurston terminal at which time the accident report was completed by Davis.

The drivers carry an accident report kit with forms to fill out for an accident. Although there is a notation on the front of the kit that the report is to be filled out "immediately," there is no time frame given the driver for completion of the report.

Killelea told Davis at the time of the suspension that the incident would be investigated. This investigation was performed by Respondent's employee, Paul Jump, safety supervisor, who reported to Killelea that it was a chargeable accident,[1] that a brick had been chipped but

[1] Chargeable is defined here as avoidable by Thurston.

that no damage had occurred, and that there was no cost for damages. Jump did find that the building had been hit in the same manner by others prior to Davis' accident.

On Sunday, July 6, 1980, Killelea spoke with Davis and told him he was discharged because he did not report the accident of July 1, 1980. This Killelea insisted was the sole reason for Davis' discharge. Davis worked for Thurston from July 1976 until his discharge. He had received safety driving awards for 3 years. Company records reflected that this driver had six accidents of a minor nature from February 1978 until the encounter on July 1, 1980. Thurston's vice president of operations testified that Davis was discharged because of (1) failure to report the accident and (2) three chargeable accidents. However, the Company's personnel records show that, on the termination notice of July 7, personnel did not confirm this and the Company did not make this entry on its records until the stamped date of July 21, 1980.

The Union Activity

In August 1979 Jimmy Mumford, an organizer with the Teamsters Union, Local 391, out of Greensboro, began working on an organizing campaign of Thurston employees. Mumford surveyed the terminals in the area, determined how many employees were located at each place, and began handbilling the terminals on August 14 or 15. Mumford's key persons in Thurston's Goldsboro terminal were Ronald Davis along with Eddie Huffman and Randolph Newsome. Davis was the primary contact for Mumford. Notice of the organizational campaign was sent to Thurston in August 1979.

At the Goldsboro terminal the campaign consisted of handbilling it once a week, and persons employed there were contacted on their lunch breaks and visited in their homes at night. Union literature was distributed. The campaign began in August 1979, and continued until the election at the Goldsboro terminal on July 17, 1980. Organizer Mumford filed charges with NLRB on two of his keyworkers—Newsome and Davis. These two workers assisted Mumford in getting addresses and names of the employees at the Thurston terminals and kept Mumford informed about meetings Thurston was having with employees talking against the Union.

About a month before the union election, Killelea met with about nine of the drivers on Thurston's Goldsboro dock at 9 o'clock in the morning. Killelea spoke about the Union and told the drivers that the Company did not need the Union and that the employees did not need it. One of Thurston's other supervisors, Ernest Brantley, met with about 30 of the employees during the same period before the election, and spoke about the Company's not needing a Union, that problems could be settled without an outside force, and that the employees could come to the Company for settling any problems.

Davis participated from the beginning in the union campaign by speaking with other employees about the union benefits and the union pay scale. He also talked with Thurston Supervisor Bill Gurley, who assigned work in the mornings, and Edward Wallace. Wallace, a night supervisor, supervised 17 men and handled the Company's business at the Goldsboro terminal from about 2 a.m. until the freight was loaded out in the morning. Wallace was contacted in June 1980 when, in the presence of Wallace's secretary, Debbie Capps, and Killelea, Capps voiced fear that the Goldsboro terminal would be closed if the Union was voted in and Davis assured her that Thurston was not going to let all the freight drop off and that he, Davis, intended to vote for the Union. Davis further indicated that, even if the Goldsboro terminal were closed, the employees would probably work out of the Wilson terminal. Wallace told Davis to be quiet and pointed toward Killelea's office. Davis replied that he did not care if Killelea heard or not because he was going to vote for the Union. Killelea denied that he knew of any involvement by Davis in union activity but admitted that he suspected Davis was involved with the Union. Certainly if Killelea entertained these suspicions so strongly, it follows that the element of knowledge has been satisfied.

Organizer Mumford and Davis met during the week of June 16 in the shack where the drivers punch the clock and receive equipment and work assignments from Bill Gurley. Bill Gurley was present at Davis' side. Davis spoke about the union benefits and the pay scale. He suggested that Mumford be given a chair and a drink since Mumford was there trying to help the employees out. Present at this encounter were Eddie Huffman and several other drivers. At various times during the campaign Davis spoke with Gurley about the Union.

The events of July 1, 1980, at the S. B. Parker's in New Bern and discharge of July 6 were approximately a week and a half before the union election. Davis, although already discharged, voted a challenged ballot in the union election.

Supervisor Greg Killelea prior to the election held two or three meetings with Thurston warehousemen and driver employees. The purpose of these meetings with the drivers and warehouse personnel was to voice the Company's opinion in opposing the Union. One other meeting with a general mix of employees was held at the Quality Inn in Goldsboro. These latter persons were opposed to the Union. The meeting was held after working hours and refreshments were served. Davis was not invited to the Quality Inn meeting because Killelea suspected that he was for the Union. Killelea suspected Davis to be prounion because he felt people who want something for nothing gravitate toward the Union. Killelea found that Davis "did not want to put in a full day's worth of work to get a full day's worth of pay and didn't like some of the things the company was doing."

Respondent here has defended the discharge of Ronald Davis on July 6, 1980, as resulting from a failure of Davis to report an accident which took place on July 1, 1980. However, facts presented in this case show that Davis was discharged because he engaged in union activity and protected concerted activity. Pertinent to this finding is the evidence that the Company had knowledge that Davis was in fact engaged in union activity. Wallace knew of Davis' union activity, and Killelea admitted that he suspected Davis was involved with the Union and therefore did not invite Davis to the meeting at the Quality Inn. Whether Davis was involved with the Union is

not controlling here since Killelea suspected that Davis was involved with union activity.

The next element as to timing indicates that Respondent discharged Davis within weeks of the election. This discharge had a chilling effect on the election itself and on the other employees and on Davis' right to engage in union activity.

The legal intent or motivation of an employer may be inferred from the nature of the discriminatory conduct itself. *Warren L. Rose Castings, Inc. d/b/a V & W Castings*, 231 NLRB 912 (1977). *Midland Ross, Inc.*, 239 NLRB 1205 (1979); *Ace Foods, Inc.*, 192 NLRB 1220 (1971); and *Banks Engineering Company, Inc.*, 231 NLRB 1281 (1979).

The reason for Respondent's discharge of Davis was not the one accident occurring on July 1, 1980, which I find is really a pretext but in fact the reason for the discharge was Davis' known union activity. This activity was known to supervisory personnel of Thurston.

Respondent claims that Davis was discharged because of an accident and that, when an employee fails to report an accident, this employee is automatically discharged. However, the testimony in this case clearly shows that other employees were allowed to have an accident and not report that accident and were not disciplined for a failure to report an accident. Indeed the whole sequence of events surrounding the chipping of one brick and the discharge of employee Davis is indeed unreasonably harsh considering the fact that this employee performed at an acceptable level for a period of time which qualified him for three safety awards. Although there is evidence that this employee had other accidents during the period from 1978 until the time of his discharge, the action taken here appears to this Administrative Law Judge to be unreasonably harsh considering that others had not always been discharged for similar offenses. This in conjunction with the proximity in time to the union election appears to me to defeat Respondent's argument that this employee was discharged for one failure to report what for all purposes was a minor accident in which less damage than any accident which he had had in the prior 4 years would have cost the Company.

As the General Counsel in his oral argument stated, Respondent's knowledge, the timing, the reasons given by Respondent, as well as this Respondent's animus against union activity by Davis and other union employees clearly show Davis was discharged because of his union activity, and in order to stifle the union activity at Respondent's installation at Goldsboro. The accident at the Parker Company was not of such significance or consequence as to warrant the discharge of employee Davis. The Respondent meted out a punishment to Davis which did not fit the crime.

Respondent's attempt to show that Davis was discharged for three prior chargeable accidents is not supported by the testimony herein but evidences a further pretext to show that Davis was lawfully discharged by Thurston. Except for his union activity, Davis would still be employed as a truckdriver by Respondent Thurston.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent's discharge of Ronald Davis for union activity constituted a violation of Section 8(a)(3) of the Act.

3. The discharge was an interference with, restraint, and coercion of an employee in the exercise of the rights guaranteed him in Section 7 of the Act to form, join, or assist labor organizations, and to engage in other concerted activities for the purpose of other mutual aid or protection, in violation of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact and conclusions of law and upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[2]

The Respondent, Thurston Motor Lines, Inc., Goldsboro, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee because of union activity or protected concerted activity.

(b) In any like manner or related manner interfering with, restraining, or coercing employees in their exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Ronald Davis immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and reimburse him for any loss of earnings suffered as a result of his unlawful discharge.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this recommended Order.

(c) Post at its Goldsboro, North Carolina, facility copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.